



Queensland University of Technology
Brisbane Australia

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[Pereira, Margaret](#)

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PRISONERS, RIGHTS AND CITIZENSHIP

Margaret Pereira

The denial of civil rights to convicts has a long history. Its origins lie in the idea of 'civil death'. Convicts who were not punished by execution would instead suffer civil death which stripped them of inheritance, family and political rights (Davidson, 2004). In Australia, and internationally, the removal of prisoners' voting rights has been a controversial topic that has been a subject of much debate and a number of legislation changes (Davidson, 2004). This article argues that even though the latest amendment to the Australian Electoral legislation is, on the face of it, democratic and inclusive, it is in fact a denial of prisoners' civil rights, which has its roots in the concept of civil death. Within the theme of Crime and Governance, this article is concerned with sociology of deviance, social reactions to crime, and socio-legal topics.

Roach v the Australian Electoral Commissioner

Under the Howard Government, the Commonwealth Electoral Act 1918 was amended to disqualify all full-time prisoners from voting. The previous Hawke and Keating Governments tried to pass legislation giving all prisoners the vote but the proposal was defeated in the Senate (Brown, 2007). Before the election of John Howard in 1998, all prisoners with sentences of less than five years were entitled to vote. In 2006, under the Howard coalition, which had a Senate majority, the Commonwealth Electoral Act was amended to completely disenfranchise all prisoners. Indigenous Australians, who are vastly over-represented in prison populations, were particularly affected by the legislation change (Davidson, 2004; Brown, 2002).

In June 2007, Victorian Indigenous prisoner Vicki Roach launched a High Court challenge to the new legislation, arguing that the exclusion of prisoners from voting is unconstitutional (The Law Report, 12 June, 2007). On 30 August 2007, in the case of Roach v the Australian Electoral Commissioner, the High Court found that the Howard Government had acted unlawfully and unconstitutionally in denying prisoners the right to vote (Human Rights Law Resource Centre, 2007). However, the case was only a partial victory. The court ruled that the ban on voting would be upheld for prisoners serving more than three years (Orr, 2007: 3). Ironically, Vicki Roach herself will remain excluded from voting.

Justification for the Court's Decision

The court's decision was based on the reasoning that a blanket ban on prisoner voting is unconstitutional and arbitrary and does not take into account distinctions between levels of culpability (Orr, 2007: 5). It was also argued that imprisonment is reserved as a last resort for the most serious offences, but most prisoners serve short sentences so the three year sentence ban will not prevent them from voting (Orr, 2007: 5).

The decision is a breakthrough for human rights as it sets a precedent to protect the voting rights of prisoners serving less than three years in prison. However, the justification for the decision rests on the notion that prisoners who commit more serious crimes (those attracting a sentence of three years or more), should not be entitled to full citizenship. The court justified the disenfranchisement of longer-term prisoners on the basis that those who have committed a serious breach of law have broken the social contract and civic responsibility should be supported by preventing them from voting (Brown, 2007: 5).

As David Brown points out, the social contract argument is a vague concept that does not provide any definitions of how a social contract is to be defined or who it should apply to (2007: 5). Assuming the existence of a social contract, there are plenty of ways in which it can be broken, not least by political, social and economic exclusion. It is not just people serving more than three years in prison who commit this breach.

Decisions made about sentencing are often circumstantial or subjective and judges vary considerably in their sentencing practices. Judicial decisions to impose a particular sentence frequently depend on extraneous factors such as geographical location, rather than on the gravity of the offence. For example, due to limited sentencing alternatives, rural offenders are more likely to receive a prison sentence for an offence that would normally attract a community penalty in an urban court (Hogg, 2007). Indigenous Australians, who are vastly overrepresented in rural courts, are particularly disadvantaged in this regard (Hogg and Carrington, 2006).

The imposition of a three-year sentence criterion for the disenfranchisement of prisoners defines the social contract solely on the basis of a prisoner's term of incarceration. It is an absurd and discriminatory proposition that a prisoner who serves two years and ten months is regarded as a citizen whereas one who serves three years will lose the right to vote. It is an anomaly of the legislation that a prisoner who serves three years between elections does not forfeit the right to vote and is not deemed to have breached the social contract. The High Court's new legislation cannot possibly take these circumstances into account and therefore its impact is unjust in its randomness.

Colonial Disenfranchisement

Well into the twentieth century Australian women, non-European migrants and Indigenous people were excluded from voting. Today, with Indigenous imprisonment rates almost 15 times higher than those for non-Indigenous prisoners (Australian Bureau of Statistics, 2006), restrictions on voting for prisoners represents a continuation of colonial disenfranchisement for Indigenous Australians.

Colonisation underpins a multitude of disadvantages for Indigenous people in post-colonial Australia and is reflected in socio-economic inequalities, normative cultural divides and differential rates of imprisonment (Broadhurst 2002; Cunneen, 2001). In contemporary Australian society Indigenous people often have lower rates of pay, higher rates of unemployment, and higher levels of community violence than non-Indigenous people (Hogg and Carrington, 2006). Dramatically higher rates of criminalisation and police intervention of Indigenous Australian compared to non-Indigenous Australians, reinforces their exclusion from social and economic participation (Hogg and Carrington, 2006).

The disproportionate disenfranchisement of Indigenous Australian prisoners can be compared to the disenfranchisement of black prisoners in the United States. With net-widening practices of policing and conviction, there have been massive expansions in American and Australian prison populations over the past 20 years (see Harvard Law Review, 2002; Australian Bureau of Statistics, 2006). Over a third of the disenfranchised population in the US are black men who are banned from voting for life. Their crimes include categories of public order offences, damaging public property or inducing another to engage in gambling (Harvard Law Review, 2002: 1940).

Civil Death, Deprivation and Liberty

The modern prison is an institution of regimented discipline, separated from the wider society for the purposes of punishment through deprivation of liberty (Foucault, 1977). Prisoners are de-individualised and limited in their choices about diet, clothing, interpersonal relations, leisure and work and are restricted in their access to basic rights such as health care, safety and protection (see Levy, 2002). The prison is ultimately concerned with the rigid functioning of a secure institution and the processing of its inmates through a system. Although these purposes are hardly compatible with the concepts of rights and citizenship, the physical and social isolation of prisoners from the wider society does not justify excluding them from citizenship (Hogg, 2002).

As Phillip Lynch, Director of the Human Rights Law Resource Centre points out, once someone goes to prison they necessarily lose certain rights and freedoms, but prisoners should not be deprived of freedom except that which is inseparable from the punishment of prison itself (ABC Online, 2007).

Arbitrary punishment which is administered in addition to that imposed by the court is an offence to basic human rights.

Although it is unclear whether the decision in the case of *Roach v the Australian Electoral Commissioner* is based on deterrence or civil dishonour (see Hill, 2000), the traditional denial of a convict's civil rights has its origins in the archaic concept of 'civil death' (Ridley-Smith and Redman, 2002). Civil death can be traced to Roman and Greek practices and also feudal England when a person convicted of treason or a felony lost all civil rights such as the right to inherit property (Ridley-Smith and Redman, 2002: 284). Civil death is a symbolic social punishment intended to humiliate, dishonour and exclude an individual who has broken the social contract, from civil participation (Ridley-Smith and Redman, 2002: 284).

The social contract and civil participation argument is fundamentally flawed as it is based on an assumption of mutual respect of social values and benefit to the state and the individual (Hill, 2000: 205). However, Australia's history of neglect and abuse is evidence that the social contract is more of a communitarian ideal than an agreement of mutual responsibility for good citizenship, at least for some sections of the community. For example, many incarcerated adults have a history of abuse and brutality suffered at the hands of the state within juvenile institutions (Senate Community Affairs Reference Committee, 2005). Often they were placed in state care for welfare related offences such as truancy, being in moral danger or being uncontrollable (see Carrington, 1993). Additionally, as a result of protection policies many Indigenous Australians were abused, displaced and dispossessed of their land and heritage. It is impossible to claim that these individuals have benefited from the social contract they are alleged to have breached.

Why Should Prisoners be Allowed to Vote?

The majority of prisoners, including Vickie Roach, will one day re-enter the community. Meanwhile, excluding people from the very society into which they are expected to participate and contribute is unlikely to inspire respect, civil responsibility and a willingness to uphold neo-liberalist notions of a social contract. If Australian citizens are to honour an ideal of good citizenship, a rehabilitative prison system should provide prisoners with opportunities for full democratic participation.

Disenfranchisement of prisoners reproduces discourse of anti-social and civil exclusion, which is the antithesis of respect, community loyalty and public participation. An inclusive community is one that takes recognition and respect of difference and diversity as its point of unity. Such a community does not utilise notions of a mutually beneficial social contract to disqualify particular social groups from membership. As Vicki Roach points out, if we exclude prisoners from society by removing their citizenship rights, how many other groups could become similarly marginalised?